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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1183

RICHARD EASTERBROOK,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

NICHOLAS FERRARO
District Attorney
Queens County
Attorney for Respondent
125-01 Queens Boulevard
Kew Gardens, N. Y. 11415
(212) 520-2092

ALAN M. SNYDER
Assistant District Attorney
of Counsel

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Introduction

This a brief in behalf of respondent in opposition to a petition for a writ of *certiorari* to the Court of Appeals of the State of New York.

Petitioner was convicted of the crime of criminal possession of a dangerous drug in the fifth degree, upon a plea of guilty before the Honorable Francis X. Smith in the Supreme Court of the State of New York, County of

Queens. The judgment of conviction was rendered on November 8, 1972, and petitioner was sentenced to the custody of the New York State Department of Correction for an indeterminate term with a maximum of three years.

Opinions Below

The indeterminate appellate tribunal below affirmed the conviction on December 17, 1973, without opinion. The memorandum of that court—the Supreme Court of the State of New York, Appellate Division, Second Department—is reported at 43 A. D. 2d 719 (1973).

On December 20, 1974, the Court of Appeals of the State of New York affirmed, without opinion, the order of the Supreme Court of the State of New York, Appellate Division, Second Department. The memorandum of that court is reported at 35 N. Y. 2d 913 (1974).

Jurisdiction

The jurisdiction of this Court to review, by way of certiorari, is invoked under 28 USC 1257(3).

Question Presented

Whether in light of the Fourth Amendment requirement for specificity of the subject to be searched, a warrant may properly authorize a search, not only of a particular premises and certain specified individuals, but also of any person who is present on the premises when the search takes place.

Statutes Involved

United States Constitution, Amendments IV, XIV.

Statement of Facts

Appellant was indicted on August 18, 1972 (Indictment Number 2639-72), by the Grand Jury, Queens County, and charged with the crime of criminal possession of a dangerous drug in the fourth degree.

Prior to the entering of a guilty plea by the petitioner, a motion was made to controvert the search warrant and suppress the evidence obtained thereby. The petitioner was arrested while exiting from an apartment for which the police had a search warrant.

In support of his motion to controvert, the petitioner, in an affidavit dated September 14, 1972, alleged that on March 6, 1970, while he was "leaving the apartment in question," the police officers who were secreting themselves in the corridor, approached, stopped the petitioner and searched him in the hallway. He further alleged that the contraband found as a result of the search was to be used against him on the trial of Indictment Number 2639-72. Petitioner sought suppression on the contraband on the ground that, since he was not named in the search warrant, the search of his person outside of the apartment was not justified by the search warrant.

In an affirmation dated September 20, 1972, the People opposed the petitioner's application on the ground that

there was a valid search warrant authorizing the search of any person found in the designated premises and that a search of the petitioner did not violate the petitioner's Fourth Amendment rights. The People further argued that the officers observed the petitioner leaving the apartment and immediately apprehended him on the basis of a search warrant with sufficient scope and that, therefore, the petitioner's affidavit presents facts which, even if true, do not entitle him to an order of suppression.

In an order dated September 22, 1972, the trial court denied, without a hearing, the petitioner's motion to suppress, indicating that the search of petitioner was authorized by the search warrant. The court, in its order, stated:

> * * * that the search warrant authorized the search of any person found at apartment 2B, and that it is of no consequence that defendant had just stepped out of the doorway of that apartment when stopped and searched.

After the court denied the petitioner's motion to suppress evidence, the petitioner withdrew his previously entered plea of guilty, and interposed a plea of guilty to the crime of criminal possession of a dangerous drug in the fifth degree.

ARGUMENT

POINT ONE

The Court of Appeals properly ruled that the search of the petitioner was within the authority of the search warrant.

At the outset, it should be noted that the petitioner, in his initial moving papers for an order of suppression, did not raise as an issue, the location of the petitioner with respect to the apartment in question. Rather, he based his argument solely on the ground that the petitioner was not named or described with particularity in the warrant. This argument on the law is completely without merit and did not create an issue of fact requiring a hearing. Furthermore, the petitioner, in both his moving papers and his brief concedes that he was exiting from the apartment at the time he was stopped by the police. It is submitted, that a search conducted a few feet from the door of the premises of a person who had just emerged therefrom is sufficiently proximate to the described premises to fall within the purview of the warrant.

Petitioner also contends that the language in the search warrant which authorized the search of "any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered * * *"* violated the petitioner's constitutional rights in that it failed to state with particularity, the person to be searched.

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* The search warrant issued followed the general format set forth in Section 797 of the Code of Criminal Procedure then in effect. (From the order of Justice Smith dated September 22, 1972.)

The Fourth Amendment of the Federal Constitution and Article 1, Section 12, of the New York Constitution, clearly prohibit only those searches and seizures deemed "unreasonable". *Elkins* v. *U.S.*, 304 U. S. 206; *People* v. *Taggart*, 20 N.Y. 2d 335; *People* v. *Finn*, 340 N. Y. S. 2d 807. A search is reasonable if conducted pursuant to a legal warrant. *Jones* v. *U.S.*, 362 U. S. 257. To justify the issuance of a search warrant, the name of the criminal need not be known or included in the warrant and a search warrant is not constitutionally defective for failure to name persons to be searched or to describe them with particularity. *People* v. *Nicoletti*, 60 Misc. 2d 108; *People* v. *Montanaro*, 34 Misc. 2d 624; CCP Section 797. The requirement of particularity with respect to the premises to be searched is satisfied by giving the address of the building and naming the person whose apartment is to be searched. *Kenny* v. *U.S.*, 81 U. S. App., D. C. 259, 157 F. 2d 442; *Shore* v. *U. S.*, 49 F. 2d 519.

The Appellate Division in affirming the conviction stated:

> It has generally been held that the requirement for specificity is satisfied if the individuals encompassed by the warrant are identified by physical nexus to the ongoing criminal event itself (*State* v. *DeSimone*, 60 N.J. 319). Thus, the validity of a search conducted pursuant to such a warrant is dependent upon the facts of each case and, in particular, upon the issue of whether there is good reason to believe that anyone present at the specified premises is a participant in the criminal activity taking place at the scene.
>
> Pursuant to that rationale such searches have been upheld in *People* v. *Nicoletti*, (60 Misc. 2d 108) and *People* v. *Pugh*, (69 Ill. App. 2d 312), involving persons present in an apartment in which drugs were being used and sold; in *Samuel* v. *State*, (222 So. 2d 3;

Fla. Sup Ct), involving a gambling operation in a building; in *Johnson* v. *State*, (440 S.W. 2d 308; Tx. Cr. App.), involving an apartment in which "pot" parties were being held and in *State* v. *DeSimone* (supra) involving an automobile used in connection with the sale of lottery slips. Conversely, such searches have been held to be invalid in *Crossland* v. *State* (266 P. 2d 649; Okl. Crim. App.), involving a cafe at which 25 to 30 persons were eating; in *Garrett* v. *State* (270 P. 2d 1101; Okl. Crim. App.), involving premises used as a filling station and beer tavern; and in *State* v. *Massie* (95 W. Va. 233), involving all persons present in a poolroom.*

The affidavit in support of this search warrant alleged that heroin was being used and sold in the apartment. In our opinion, it may be said that the criminal activity was of such a nature and the premises so limited that it was likely that everyone present was party to the offense. Under the circumstances, we are of the opinion that the search of one identified only by his physical nexus to the premises was valid in this case and that the police officers had reasonable cause to believe that defendant was one who might "have such property in his possession or under his control or to whom such property may have been delivered."

The Court of Appeals in affirming the decision of the Appellate Division held that, "the defendant, who was seen, apprehended and searched as he was exiting the apartment, was within the area and class of individuals authorized to be searched (*cf. People* v. *Marshall*, 3 N.Y. 2d 28) and, thus his motion to suppress was properly denied.

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* *Cf. People* v. *Nieves*, —— N.Y. 2d —— (March 26, 1975), involving a restaurant which was open to the public.

Thus, it is submitted that the search of the petitioner was not a violation of his constitutional rights merely because he was not specifically named in the warrant.

Conclusion

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

NICHOLAS FERRARO
District Attorney
Queens County

ALAN M. SNYDER
Assistant District Attorney
of Counsel

April, 1975